Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	**CC Docket No. 96-262**
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

REPLY COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"), through undersigned counsel and pursuant to Section 1.429(g),[1] hereby responds to the comments of other parties addressing selected petitions for reconsideration and/or clarification of the *Seventh Report and Order*, FCC 01-146, released in the captioned proceedings on April 27, 2001 ("*Seventh Report and Order*"). The majority of commenters joined with ASCENT in opposing the "Petition for Clarification or, in the Alternative, Reconsideration" filed by Qwest Communications International Inc. ("Qwest"), and in supporting the "Petitions for Reconsideration" filed by Time Warner Telecom ("Time Warner") and collectively by Focal Communications Corporation and US LEC Corp. (collectively, "Focal"). AT&T Corp., however, urged the Commission to grant the relief sought by Qwest and joined with Sprint Corporation ("Sprint") in opposing the reconsideration sought by Time Warner and Focal.

47 C.F.R. § 1.429(g).

[1] 47 C.F.R. § 1.429(g).

Qwest Petition

The support offered by AT&T for Qwest's reconsideration request can best be characterized as *pro forma*. Thus, for example, with respect to Qwest's request that the Commission compute certain competitive local exchange carrier ('LEC") "safe harbor" transitional rates by subtracting from incumbent LEC interstate switched access charges those rates associated with service elements that the competitive LEC may not provide in all instances, AT&T, having noted that "CLECs often install their local switches behind an ILEC tandem switch so that all traffic between the CLEC and the IXCs goes through the ILEC tandem switch," simply asserts that "the CLEC should be permitted to charge only the access rate of the competing ILEC reduced by the amount of the ILEC tandem switching and transport charges," so that the IXC is "not charged twice for the tandem switching and transport functions."[2] And with respect to Qwest's contention that interexchange carriers ("IXC's") should be permitted to unilaterally decline to exchange traffic with any competitive LEC that does not "timely" provide "sufficient" billing information to the IXC, AT&T, having declared that "there are other legitimate bases for an IXC to decline to accept traffic from a CLEC besides the price of the service," blithely opines that "the Commission should make clear that, regardless of the access rate tariffed by the ILEC, an IXC is not required under Section 201(a) to accept traffic from a CLEC that fails to provide the IXC with sufficient information to bill the CLEC's end user customer for long distance calls carried over the IXC's network."[3] With respect to the former, AT&T misperceives the nature of the Commission's transitional benchmarking mechanism; as to the latter, AT&T simply overreaches.

As ASCENT emphasized in opposing Qwest's request to set certain competitive LEC "safe harbor" transitional rates below incumbent LEC access charges, Qwest's proposal runs

[2] AT&T Opposition at 18.

[3] Id. at 19 - 20.

afoul of the Commission's twin objectives of creating a readily administrable "bright line rule . . . [for] determin[ing] . . . whether a CLEC's access rates are just and reasonable" and establishing a transitional mechanism that constrains competitive LEC pricing of switched access while avoiding undue disruption within the competitive LEC market segment. As ASCENT pointed out, the subtractive approach advocated by Qwest (and now AT&T) would generate the same contentiousness that prompted the Commission to adopt its "safe harbor" transitional mechanism. Moreover, ASCENT also stressed, the Commission specifically adopted rate caps reflective of common industry charges, rather than carrier-specific rates, in order to maximize competitive LEC flexibility in recovering the costs of traffic origination and termination.

AT&T's assertion that IXCs are being charged twice for certain functions erroneously assumes that the Commission's sole goal in the *Seventh Report and Order* was to create a competitive LEC access pricing mechanism which would precisely replicate incumbent LEC charges and that the Commission pursued this end without regard to ease of administration, degree of burden, or business or competitive impact. To the contrary, even a cursory reading of the *Seventh Report and Order* reveals that ease of administration, degree of burden, and business and competitive impact were integral elements of the Commission's decisionmaking. Indeed, these considerations directly underlie the refusal by the Commission to "flash-cut" to incumbent LEC rates, its commitment to avoid undue dislocation in the competitive LEC community, its effort to preserve competitive LEC flexibility in setting and structuring access charges, and its attempt to provide for a simple determination of the justness and reasonableness of competitive LEC charges.[4] Hence, AT&T is incorrect in its suggestion that IXCs are paying twice for certain services; to the

---

4 Seventh Report and Order, FCC 01-146 at ¶¶ 35 - 63.

contrary, IXCs are paying both incumbent LECs and competitive LECs for the respective services they receive from each. The rates that IXCs are paying competitive LECs for the services so received are reflective of Commission efforts to balance the respective interests of IXCs and competitive LECs taking into account ease of administration, degree of burden, and business and competitive impact. The balance so struck predicated competitive LEC rate caps on rates charged by incumbent LECs for the "basic services that make up interstate switched access service offered by most carriers."[5]

While AT&T couches its support for Qwest in terms of equity, its equitable solution would not only potentially deny competitive LECs a reasonable vehicle for recovery of their costs of originating and terminating access tariff, but would impose upon such carriers substantial new administrative burdens. As described by Z-Tel Communications, Inc. ("Z-Tel"), "the Qwest approach would require a CLEC (and conceivably this Commission in tariff reviews and complaint proceedings) to conduct element-by-element analyses of the 'competing LEC' rate in every jurisdiction in which a CLEC provides service to determine whether a CLEC's tariff is consistent with the Commission's benchmark."[6] Coupled with the burden of pursuing, and potentially litigating, recurrent disputes with large IXCs over which access services might or might not be providing, the burden of the Qwest/AT&T approach on small competitive LECs would likely

---

5 Id. at ¶ 55.

6 Z-Tel Opposition at 6.

approach intolerable proportions. The Commission's "bright-line rule" would quickly morph under the Qwest/AT&T approach into a source of ongoing resource-draining disputes.

AT&T's suggestion that Qwest is correct in its view that an IXC need not exchange traffic with any competitive LEC that does not provide it with all of the information it deems necessary to bill end users is no more meritorious. AT&T characterizes such a unilateral refusal to exchange traffic as "legitimate," and permissible under Section 201(a) as a just and reasonable practice. As ASCENT demonstrated in opposing Qwest's position on this matter, an IXC's refusal to exchange traffic with a competitive LEC whose switched access charges remain within the "safe harbor" established by the Commission is not only facially unlawful, but would conflict with the policy judgments articulated by the Commission in the *Seventh Report and Order*. "[A]n IXC's refusal to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area," the Commission unequivocally held, "would violate section 201(a)."[7] Thus, as a legal matter, the relief Qwest seeks must be denied as a violation of Section 201(a). From a public policy perspective, a contrary holding would "disrupt the workings of the public switched telephone network" and "harm universal service" to no less of an extent than a unilateral refusal to exchange traffic based on the IXC's view that the access charges assessed by a competitive LEC's are inflated, particularly given the disparity in bargaining power between large IXCs and small competitive LECs.[8]

---

7 Seventh Report and Order, FCC 01-146 at ¶ 92.

8 Id.

Moreover, as Z-Tel correctly notes, the Qwest/AT&T proposal to license large IXCs to unilaterally refuse to exchange traffic based on purported inadequacies in a competitive LEC's provision of billing data is "unadministrable."[9] The unilateral authority Qwest/AT&T seek, Z-Tel points out, apparently would reserve to the IXC the determination of what constitutes "sufficient" and "timely" delivery of billing information. The Commission, having determined that IXC self-help remedies are not in the public interest, should not replace one such remedy with another no less nebulous, albeit equally as draconian, one.

As ASCENT emphasized in its opposition to the Qwest-requested relief, other avenues of relief are available to IXCs who believe that they are being denied access to necessary billing information. ASCENT, for example, suggested that Qwest could petition the Commission to initiate a rulemaking to make mandatory the delivery of the billing information which it believes it is currently being denied. The Association of Local Telecommunications Services ("ALTS") notes that another "remedy for an IXC that is unable to purchase, at market or tariffed rates, adequate billing information from a CLEC would be to file a Section 208 complaint and seek redress from the Commission on a case-by-case basis."[10] Either approach would certainly be preferable to unilateral exploitation of a self-help mechanism which, as ALTS correctly notes, "could easily lead to abuse."[11]

<u>Time Warner and Focal Petitions</u>

---

[9] Z-Tel Opposition at 7.

[10] ALTS Comments at 13.

[11] Id. at 13 - 14.

AT&T and Sprint oppose Time Warner's and Focal's request that the Commission repeal or, at a minimum, relax its "new market" rule primarily on the grounds that such action would encourage inefficient market entry and that competitive LECs should have anticipated in developing their business plans the various caps imposed by the Commission on switched access charges.[12] Both objections conflict with the rationale underlying the Commission's transitional benchmarking mechanism.

As ASCENT emphasized in its comments supporting the Time Warner/Focal requested relief, the Commission recognized that a "transitional mechanism is vitally important to avoid too great of a dislocation in the CLEC segment of the industry," thereby acknowledging that "unnecessary damage to . . . growing competition . . . likely would result from an immediate transition to the ILEC rate."[13] The Commission correctly concluded that a transition period was "necessary to permit CLECs to adjust their business plans and obtain alternative sources for the substantial revenues of which the benchmark will deprive them -- revenues on which they have previously relied in formulating their business plans."[14] Hence, the Commission has already answered AT&T/Sprint's foreseeability objection, concluding that a three-year transition to incumbent LEC rate levels is reasonable in light of the circumstances to afford competitive LECs adequate time to revamp their business strategies. If competitive LECs indeed had no "reasonable expectation" that they would continue to be permitted to set their own access charges, the Commission would not have developed a transitional benchmarking mechanism to avoid undue disruption and dislocation.

---

12 AT&T Opposition at 6 - 7, 9 - 10; Sprint Opposition at 3 - 6.

13 <u>Seventh Report and Order</u>, FCC 01-146 at ¶ 62.

14 <u>Id</u>.

Neither is inefficient market entry the issue here. The Commission has already determined, rightly or wrongly, that allowing competitive LECs unconstrained pricing freedom with respect to exchange access services "may promote economically inefficient entry into the local markets and may distort the long distance market."[15] It is this concern, among others, that prompted the Commission to cap competitive LEC access charges within the context of its transitional benchmarking mechanism.

The issue presented by Time Warner and Focal is whether the transitional benchmarking mechanism should be extended to new markets. Or more precisely, the issue is whether the need to avoid disruption and dislocation within the competitive LEC market segment extends to new markets. ASCENT believes that Time Warner and Focal have persuasively demonstrated that it does and neither AT&T nor Sprint has offered anything other than rhetoric to suggest that it doesn't. As ASCENT argued in its comments addressing the Time Warner and Focal Petitions, business plans are developed well in advance of market entry and implementation of those plans takes months and often years. Hence, the need for a transitional period to allow for adjustment of business strategies is no less strong in a planned market than it is in an operational market.

The public policy arguments raised by AT&T and Sprint against the relief sought by Time Warner and Focal actually turn matters on their head. While AT&T and Sprint speak in theoretical terms of inefficient market entry, Z-Tel provides "real world" examples of thwarted competitive entry, and more consequently, thwarted mass-market competitive entry, that will result from the "new market" rule. As Z-Tel explains, "[t]he new markets rule flatly ignores . . . [the] statewide nature of UNE Platform market entry," explaining that "carriers that use the UNE Platform entry strategy expend resources to enter the competing ILEC's service territory in a State, not just a single MSA or city." Hence, "the net impact of the new MSA rule is to deter entry into new

15 Id. at ¶ 32.

markets" within States partially served by UNE-Platform providers. ALTS also notes the adverse public policy implications of the "new market" rule, emphasizing its discriminatory nature. As described by ALTS, "[t]he 'new market' rule is discriminatory because it unreasonably treats new entrants differently from carriers already established in a market." The "new market" rule, ALTS explains, forbids certain carriers from recovering the same level of costs from interexchange carriers . . . as other carriers that entered the market at an earlier time."

Conclusion

By reason of the foregoing, the Association of Communications Enterprises again urges the Commission to deny the reconsideration petition filed by Qwest, and to grant the petitions for reconsideration filed by Focal and Time Warner.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

By: /s/

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1424 Sixteenth Street, N.W., Suite 105
Washington, D.C. 20006
(202) 293-2500

August 3, 2001

Its Attorneys

CERTIFICATE OF SERVICE

I, Charles C. Hunter, do hereby certify that a true and correct copy of the foregoing document was served by First Class Mail, postage prepaid, on the individuals list below, on this 3rd day of August, 2001:

Sharon J. Devine
Craig J. Brown
Qwest Communications International Inc.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Richard M. Rindler
Patrick J. Donovan
Michael P. Donahue
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007

Thomas Jones
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

Karen Brinkman
Alexander D. Hoehn-Saric
Latham & Watkins
555 11th Street, N.W.
Suite 1000
Washington, D.C. 20036

David Cosson
John Kuykendall
Kraskin, Lesse & Cosson, LLP
2120 L Street, N.W.
Suite 520
Washington, D.C. 20037

Margot Smiley Humphrey
Holland & Knight LLP
2099 Pennsylvania Avenue, N.W.
Suite 100
Washington, D.C. 20006-6801

Richard J. Johnson
Michael J. Bradley
Moss & Barnett, A Professional Association
4800Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402-4129

Richard Juhnke
Sprint Corporation
401 9th Street, N.W.
Washington, D.C. 20004

James F. Bendernagel, Jr.
C. John Buresh
Daniel Meron
Sidley Austin Brown & Wood
1722 Eye Street, N.W.
Washington, D.C., N.W.

Michael B. Hazzard
Tamara E. Connor
Kelley Drye & Warren LLP
8000 Towers Crescent Drive
Twelfth Floor
Vienna, Virginia 22182

James U. Troup
James H. Lister
Arter & Hadden LLP
1801 K Street, N.W.
Suite 400K
Washington, D.C. 20006-0172

Teresa K. Gaugler
Jonathan Askin
Association for Local Telecommunications Services
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006

Henry G. Hultquist
WorldCom, Inc.
1133 19th Street, N.W.
Washington, D.C. 20036

/s/

Charles C. Hunter